

UNITED STATES COURT OF APPEALS February 8, 2010

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re: EDWARD MUNIZ,

Petitioner.

No. 09-1547
(D.C. No. 1:07-CV-01914-MSK-MJW)
(D. Colo.)

ORDER

Before **TACHA, BRISCOE**, and **MURPHY**, Circuit Judges.

Edward Muniz has filed a petition for a writ of mandamus asking this court to direct the district court to rule on his pending motion to alter the judgment, and his pending motion for extension of time to file an appeal. Mr. Muniz asserts in his petition that “[i]n order to continue with my appeal these motions need to be answered.” Pet. at 1.

Shortly before Mr. Muniz filed his mandamus petition, he filed his notice of appeal. On December 14, 2009, we dismissed Mr. Muniz’s appeal as untimely. In the dismissal order, we noted that judgment was entered on August 14, 2009, and the notice of appeal was due on or before September 14, 2009. Mr. Muniz did not file his notice of appeal until December 4, 2009. Although he did file a motion to alter the judgment, that motion was untimely and therefore it did not toll the time for filing a notice of appeal. Mr. Muniz also filed a motion for

extension of time to file his notice of appeal, but that motion was untimely because it was not filed within the thirty-day time period for filing a notice of appeal. Because Mr. Muniz did not timely file his notice of appeal and there was no basis to toll the time period for filing his appeal, we dismissed the appeal. We noted, however, that if and when the district court ruled on his pending post-judgment motion, he could appeal from that ruling, if he wished to do so.

On February 4, 2010, the district court denied as moot Mr. Muniz's motion for an extension of time to file an appeal. Although the district court has not ruled on his motion to alter the judgment, Mr. Muniz can no longer argue that he needs the district court to rule on that motion in order to continue with his appeal because his appeal has been dismissed. Mr. Muniz is still free to file an appeal from the district court's disposition of his post-judgment motion, once the court rules on that motion. Accordingly, we DENY as moot Mr. Muniz's petition for a writ of mandamus, and we DENY Mr. Muniz's motion to proceed without prepayment of fees. Mr. Muniz is directed to pay the filing fee immediately.

Entered for the Court,

A handwritten signature in black ink, reading "Elisabeth A. Shumaker". The signature is fluid and cursive, with a long horizontal flourish at the end.

ELISABETH A. SHUMAKER, Clerk